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16 UNITED STATES DISTRICT COURT  
17  
18 DISTRICT OF NEVADA

19 Cung Le, Nathan Quarry, and Jon Fitch,  
20 Bradon Vera, Luis Javier Vazquez, and Kyle  
21 Kingsbury, on behalf of themselves and all  
22 others similarly situated,

23 Plaintiffs,

24 v.

25 Zuffa, LLC, d/b/a Ultimate Fighting  
26 Championship and UFC,

27 Defendant.

28 No.: 2:15-cv-01045-RFB-(PAL)

PLAINTIFFS' OPPOSITION TO ZUFFA,  
LLC'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT AS TO PLAINTIFF NATHAN  
QUARRY ON STATUTE OF LIMITATIONS  
GROUNDS

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1       **I. INTRODUCTION**

2       Zuffa's motion for partial summary judgment seeks dismissal of claims brought by Plaintiff Nate  
 3 Quarry based on the statute of limitations. Dkt. 347 ("Motion"). Plaintiff Quarry alleges that Zuffa  
 4 suppressed the compensation he received for his identity rights by engaging in a multifaceted scheme in  
 5 violation of Section 2 of the Sherman Act. The alleged scheme included the use of exclusive fighter  
 6 contracts, the acquisition of rivals, and threats to fighters and rivals to acquire monopsony power in the  
 7 market for "Elite Professional MMA Fighter Services." Consolidated Amended Antitrust Class Action  
 8 Complaint ("CAC") ¶¶ 109-134. Zuffa used its monopsony power to artificially under-compensate the  
 9 proposed Class of MMA Fighters, such as Plaintiff Quarry, for use of their images and likenesses. CAC  
 10 ¶¶ 3, 22, 34, 92, 107, 151.<sup>1</sup> Plaintiff Quarry was injured in this way (*i.e.*, through under-compensation for  
 11 the UFC's exploitation of his identity rights) during the limitations period.<sup>2</sup> This is so because, *inter*  
 12 *alia*, Zuffa continues to sell licensed products and digital media that feature his image and likeness and  
 13 thereby continues to injure him. *Id.* ¶ 34. Plaintiff Quarry has received *no payment* from Zuffa during the  
 14 limitations period, and continues to receive *no payment* for Zuffa's ongoing uses of his image and  
 15 likeness. The CAC alleges that absent the challenged anticompetitive scheme Plaintiff Quarry and the  
 16 other members of the Identity Class would be compensated more than they currently are *each time* Zuffa  
 17 *exploits* any of their identity rights. CAC ¶¶ 92, 107. Thus, each time Zuffa exploits Plaintiff Quarry's  
 18 identity rights during the limitations period Zuffa injures him anew.

19       Zuffa's motion rests on a fundamental misunderstanding of the claims of members of the  
 20 proposed Identity Class of which Plaintiff Quarry is a representative.<sup>3</sup> They are based not simply—or  
 21 even significantly—on Zuffa's *agreements* with Identity Class members like Plaintiff Quarry, but on  
 22 Zuffa's anticompetitive scheme *as a whole*. That scheme, which is ongoing, has continued to harm

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24       <sup>1</sup> Plaintiff Quarry is a representative of the "Identity Class." CAC ¶¶ 34, 50.

25       <sup>2</sup> Plaintiff Quarry filed suit on December 16, 2014. Dkt. 1. The limitations period is thus the four-year  
 26 period between December 16, 2010 to December 16, 2014 (hereinafter, "limitations period").

27       <sup>3</sup> The CAC alleges two classes, the Bout Class and Identity Class, and two types of antitrust injury:  
 28 Zuffa has artificially under-compensated the Bout Class members for their fights; Zuffa has artificially  
 under-compensated the Identity Class members for the use of their likenesses and identities. *Id.* ¶ 21.  
 Plaintiff Quarry did not fight during the four year limitations period, and so is not a member of the Bout  
 Class.

1 Plaintiff Quarry each time Zuffa has used his likeness without compensating him at a competitive level,  
 2 which, in his case, is above zero. CAC ¶ 34, 50.

3 Zuffa thus misses the point when it argues that because the harm Plaintiff Quarry alleges “arises  
 4 solely out of the express terms of his agreements with Zuffa” his claims are time-barred. Motion at 2. It  
 5 is true, as Zuffa asserts, that the last contract between Zuffa and Plaintiff Quarry relating to his identity  
 6 rights was in 2010. *Id.* at 6, 8-10. But it is untrue that the harm Plaintiff Quarry suffered arises solely out  
 7 of the express terms of his agreements with Zuffa. The harm arises from the scheme as a whole. As a  
 8 result, for purposes of the statute of limitations, the dates of his contracts with Zuffa are beside the  
 9 point. What matters is that Zuffa’s overall scheme injured Plaintiff Quarry each time the UFC exploited  
 10 Plaintiff Quarry’s identity rights during the limitations period—*i.e.*, each time it paid Plaintiff Quarry  
 11 nothing when it sold a product or service featuring his image or likeness or licensed the ability to do so  
 12 to a business partner. In any event, Zuffa contracted to exploit Plaintiff Quarry’s identity rights with its  
 13 business partners such as Reebok, Topps, and Getty Images within the limitations period.

14 None of the expropriations Plaintiff Quarry challenges are spelled out in the “express terms” of  
 15 his contracts with Zuffa. Zuffa presents no evidence that they are. Rather, the expropriations are  
 16 continuing acts in a larger ongoing anticompetitive scheme. Plaintiff Quarry’s allegations that his  
 17 identity rights were expropriated during the limitations period, and that this harm is ongoing, are  
 18 unchallenged. The evidence offered by Zuffa does not address the issues that are central to applying the  
 19 statute of limitations. Thus, Zuffa has not met its initial burden to present evidence that Plaintiff  
 20 Quarry’s claims are time-barred, and Zuffa has failed to shift the burden to Plaintiff Quarry to present  
 21 evidence that his claims are timely.

22 Even assuming Zuffa’s motion shifted the burden to Plaintiff Quarry, his claims are not time-  
 23 barred because he can show evidence of affirmative “overt acts” taken by Zuffa where his image or  
 24 likeness was used without fair compensation within the limitations period. As alleged, absent the  
 25 challenged anticompetitive scheme, Zuffa would not have had sufficient monopsony power to under-  
 26 compensate its fighters, such as Plaintiff Quarry, and he would have been paid for each use. CAC ¶¶ 50,  
 27 92, 107. In December 2013, Zuffa launched “Fight Pass,” an online digital media platform. On Fight  
 28 Pass, Zuffa has published and made available for public viewing—for a price—the UFC fights of its

1 fighters, including Plaintiff Quarry's. Zuffa has even published and made available for public viewing  
 2 selected fights of its fighters before they were in the UFC, including one of Plaintiff Quarry's fights with  
 3 a minor league promoter. Additionally, in the four years before Plaintiff Quarry filed suit, Zuffa took  
 4 numerous other "overt acts:" it licensed Plaintiff Quarry's likeness and image for UFC trading cards  
 5 published in 2011 and 2013; it sold and continues to sell autographed posters for Plaintiff Quarry's UFC  
 6 Middleweight Championship bout; it created television and internet programming featuring Plaintiff  
 7 Quarry; and it included Plaintiff Quarry's image and likeness in promotional content posted on its  
 8 website. Zuffa also used Plaintiff Quarry's likeness on a regular basis as part of the opening video  
 9 montage for Zuffa's most lucrative events: For years, Zuffa used a clip of one of Plaintiff Quarry's fights  
 10 as the opening for its Pay-Per-View ("PPV") events. Zuffa compensated Plaintiff Quarry at artificially  
 11 low levels (*i.e.*, at zero) for each of these uses. Plaintiff Quarry testified to these expropriations during  
 12 his deposition, and Zuffa's motion ignores all of them.

13 Zuffa argues that Plaintiff Quarry cannot show a continuing violation because its own "receipt of  
 14 benefits" from an alleged anticompetitive scheme cannot be an "overt act" for purposes of the statute  
 15 of limitations. Motion at 12. But affirmative acts to expropriate identity rights are indeed "overt acts."  
 16 Under remarkably similar circumstances, a district court in the Ninth Circuit rejected the very  
 17 argument Zuffa relies on here, *i.e.*, that expropriation of athletes' likenesses is simply the "receipt of  
 18 benefits" (coincidentally relying on a brief authored by Zuffa's current counsel, who in that case  
 19 represented the injured athlete). That litigation involved the use of the images and likenesses of college  
 20 athletes by the NCAA and its business partners. The NCAA sought to dismiss antitrust claims by two  
 21 college basketball legends—Ed O'Bannon and Bill Russell—whose identity rights were expropriated by  
 22 the NCAA subject to the terms on which they agreed to scholarships with their respective schools many  
 23 years before the initiation of the litigation. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*,  
 24 37 F. Supp. 3d 1126 (N.D. Cal. 2014); *Russell v. NCAA*, 2012 U.S. Dist. LEXIS 68684 (N.D. Cal. May  
 25 16, 2012). The NCAA argued that O'Bannon and Russell's scholarship agreements occurred much  
 26 more than four years before the lawsuits were filed. The District Court rejected those arguments,  
 27 holding that the claims did *not* arise from the scholarship agreements by which compensation for their  
 28 likenesses was suppressed, but from the "overt acts" taken by the NCAA in offering digital media

1 featuring games in which they played for sale on the internet. As Zuffa indisputably offered a similar  
 2 digital streaming service starting in 2013, *O'Bannon* and *Russell*—which are consistent with a long line  
 3 of precedent—are directly on point. This Court should similarly reject Zuffa's argument based on the  
 4 statute of limitations.

## 5 II. BACKGROUND

### 6 A. Zuffa's Anticompetitive Scheme

7 Plaintiffs<sup>4</sup> allege that Zuffa used anticompetitive conduct to establish and maintain its  
 8 dominance in the market for purchasing the services and identity rights of Elite MMA Fighters,  
 9 including Plaintiff Quarry. Zuffa acquired monopsony power in the market for "Elite Professional MMA  
 10 Fighter Services" by engaging in a series of anticompetitive actions, including (a) entering long-term,  
 11 exclusive contracts with Elite MMA Fighters that effectively blocked the vast majority from fighting for  
 12 rival promotions (CAC ¶¶ 109-114); (b) threatening or otherwise impairing other MMA promoters,  
 13 sponsors and fighters from working with the UFC's potential rivals (*Id.* ¶¶ 116-119); (c) entering into  
 14 exclusive agreements with sponsors and venues (*Id.* ¶¶ 120-127); and (d) acquiring multiple rival  
 15 promotion companies that Zuffa had weakened through the foregoing conduct. *Id.* ¶¶ 129-134. As a  
 16 result of this Scheme, Zuffa is the "only game in town" in the relevant market. *Id.* ¶¶ 5. As the Court  
 17 noted, "Exclusive dealing arrangements are but a part of this scheme," and "Plaintiffs allege multiple  
 18 acts that, as a whole, constitute an anticompetitive scheme." *Cung Le v. Zuffa, LLC*, No. 2:15-cv-01045-  
 19 RFB-PAL, 2016 U.S. Dist. LEXIS 145478, at \*40 (D. Nev. Oct. 19, 2016).

20 Plaintiffs allege that because of Zuffa's monopsony power Plaintiff Quarry and other members of  
 21 the Identity Class lacked the ability to "turn to alternative MMA Promoters to earn competitive  
 22 compensation" for their identity rights. CAC ¶ 90. More specifically, as relevant to Plaintiff Quarry's  
 23 claims, Zuffa uses its monopsony power to "require UFC Fighters to enter into restrictive contracts,"  
 24 "expropriate the rights to UFC Fighters' Identities in perpetuity for little or no compensation (which is  
 25 below competitive levels)," and "expropriate the Identities and deprive UFC Fighters of competitive

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27  
 28 <sup>4</sup> Plaintiffs are Cung Le, Nathan Quarry, Jon Fitch, Brandon Vera, Luis Javier Vazquez, and Kyle  
 Kingsbury. CAC ¶¶ 2-3.

1 levels of payment for the exploitation of their Identities in UFC Licensed Merchandise and/or  
 2 Promotional Materials licensed or sold by the UFC or its licensees.” *Id.* ¶ 91.

3 Zuffa’s motion does not challenge any aspects of the foregoing monopsony scheme alleged by  
 4 Plaintiffs. Zuffa does not dispute in its motion that being under-compensated for identity rights due to  
 5 an anticompetitive scheme constitutes cognizable antitrust injury. Indeed, this Court has noted that  
 6 Zuffa’s contracts require “UFC Fighters to attend, cooperate and assist in the promotion of bouts in  
 7 which they fight and, as required by the UFC, any other bouts, events, broadcasts, press conferences  
 8 and sale of merchandise, for no additional compensation.” *Le v. Zuffa, LLC*, 2016 U.S. Dist. LEXIS  
 9 145478 at \*40. Nor does Zuffa deny that it expropriated Plaintiff Quarry’s identity rights during the  
 10 limitations period.

11       **B. Plaintiff Quarry and Members of the Identity Class Allege Ongoing Antitrust  
 12 Injury.**

13 Plaintiff Quarry is a representative and member of the “Identity Class,” which comprises  
 14 “[e]ach and every UFC Fighter whose Identity was expropriated or exploited by the UFC, including in  
 15 UFC Licensed Merchandise and/or UFC Promotional Materials.” CAC ¶ 47. “UFC Promotional  
 16 Materials” include uses of UFC Fighters’ identities in “all forms of television” “including . . .  
 17 interactive, home or . . . pay . . . subscription” and video footage that is accessed via “computer . . . and  
 18 all Internet applications” for which Zuffa receives revenues. CAC ¶ 27(u). This definition also includes  
 19 efforts to monetize UFC Fighters’ “photographs” and “merchandising” based on their UFC fights. *Id.*  
 20 “UFC Licensed Merchandise” means “apparel,” “photographs,” “collectibles,” “trading cards,” and  
 21 other products bearing the UFC trademark and UFC Fighters’ images, likeness, or names. *Id.* ¶ 27(t).

22 Plaintiff Quarry alleges that Zuffa expropriated and exploited his identity rights—and  
 23 continues to do so. CAC ¶ 34 (“Quarry’s Identity was expropriated and his compensation for appearing  
 24 in UFC Licensed Merchandise and UFC Promotional Materials was artificially suppressed due to the  
 25 scheme alleged herein. Quarry was and *continues to be* injured as a result of the Defendant’s unlawful  
 26 conduct.”) (emphasis added).

27 On September 25, 2015 the Court denied Zuffa’s motion to dismiss these claims. Ruling from  
 28 the bench, the Court observed that Plaintiffs had alleged that, as a result of Zuffa’s conduct, UFC

Fighters such as Plaintiff Quarry were harmed: “the antitrust injury on the monopsony part is that the fighters don’t get the salaries that they want to get. They don’t get the number of fights that they’d want to get. *They don’t get to control their images.*” Sept. 25, 2015 Tr.. at 46:24-47:2 (emphasis added).<sup>5</sup> Summarizing Plaintiffs’ allegations of antitrust injury, including that “the Identities of UFC Fighters continue[] to be expropriated and compensation by the UFC and its licensees for the expropriation of, exploitation of and right to exploit Identities of the members of the Identity Class has been and continues to be artificially suppressed,” this Court ruled that “Plaintiff has sufficiently plead antitrust injuries sufficient to survive a motion to dismiss.” *Cung Le v. Zuffa, LLC*, 2016 U.S. Dist. LEXIS 145478 at \*44-45.

Zuffa’s motion does not dispute any of Plaintiffs’ allegations concerning Zuffa’s use of UFC Fighters’ images and likenesses and whether that constitutes cognizable antitrust injury.

### **C. Zuffa’s Use of Plaintiff Quarry’s and Other Class Members’ Identities After December 16, 2010.**

The UFC provided Plaintiff Quarry below-competitive compensation—indeed, no compensation at all—while using his name, image, or likeness in multiple UFC licensed products, services, and commercial promotions within the limitations period, *i.e.*, after December 16, 2010 (the limitations period dates back four years before the filing of the first complaint in this matter on December 16, 2014).

#### **1. Zuffa Appropriates Plaintiff Quarry’s Image and Likeness in Promotional Materials, Including Fight Pass.**

On November 19, 2005, Plaintiff Quarry fought for the UFC Middleweight Championship in “UFC 56.” Declaration of Nathan Quarry (“Quarry Decl.”) ¶ 5. Plaintiff Quarry’s fight was the co-headlining event for UFC 56, and Zuffa printed posters to promote and advertise the event. *Id.* ¶ 15. Plaintiff Quarry lost his match with Rich Franklin in UFC 56 in what became an iconic moment in UFC history. Zuffa has regularly used a clip from this fight to promote the UFC. Plaintiff’s Statement of Additional Material Facts (“SAMF”), at ¶¶ 63 & 72. The clip became part of Zuffa’s video montage for

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<sup>5</sup> Relevant pages of the transcript are attached as Exhibit 24 to the Declaration of Matthew S. Weiler (“Weiler Decl.”).

1 the introduction to its PPV events for many years, at least through 2015. Quarry Decl. ¶ 6; Quarry Dep.  
 2 Tr. at 48:20-23; 105:23-25; SAMF ¶ 63. In November 2013, Zuffa published the “Top 20 Knockouts in  
 3 UFC History,” a video compilation including Plaintiff Quarry’s fight with Franklin that Zuffa posted on  
 4 Youtube to commemorate the UFC’s twentieth anniversary. SAMF ¶ 70. The video has been viewed  
 5 over sixty-nine million times. Weiler Decl. Ex. 2. Plaintiff Quarry never received any compensation for  
 6 Zuffa’s use of this footage. SAMF ¶ 63, 70.

7 In December 2013 Zuffa launched Fight Pass. SAMF ¶ 59; Zelaznik Dep. Tr. at 17:11-12. Fight  
 8 Pass is a subscription “digital streaming service” that allows viewers to access a substantial library of  
 9 content featuring virtually all UFC Fighters, making it “[t]he world’s largest mixed martial arts fight  
 10 library.” SAMF ¶ 60. On Fight Pass, which is accessed through Zuffa’s website, Zuffa charges MMA  
 11 fans a subscription fee to use “a platform for all this MMA so that fans could access it.” Zelaznik Dep.  
 12 Tr. at 69:10-12; *see also id.* at 69:20-70:2. [REDACTED]

13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 All nine of Plaintiff Quarry’s fights while under contract with Zuffa can be viewed in their  
 17 entirety on Fight Pass, as can other videos featuring Plaintiff Quarry. Weiler Decl. Ex. 5; Quarry Dep. Tr.  
 18 at 104:15-17; SAMF ¶ 61. Purchasers of Fight Pass can watch Plaintiff Quarry’s win in the finale of The  
 19 Ultimate Fighter Season 1, and his victory as part of an MMA event called “Gladiator Challenge 14.”  
 20 *Id.*; SAMF ¶ 62. Zuffa allows business partners such as Amazon, Sony, and Xbox to make available UFC  
 21 events that featured Plaintiff Quarry, and received additional revenue from these partners when viewers  
 22 watched these events through these platforms. SAMF ¶ 66. [REDACTED]

23 [REDACTED]  
 24 [REDACTED]  
 25 Zuffa did not compensate UFC Fighters for the use of their images or likenesses in connection  
 26 with Fight Pass. SAMF ¶ 64. [REDACTED]

1 [REDACTED] Zelaznik Dep. Tr. at 82:15-17; *see also id.* at 83:11-13. Plaintiff  
 2 Quarry has never been compensated for any content that was made available on Fight Pass. Quarry Dep.  
 3 Tr. at 104:15-17; SAMF ¶ 65.

4 In addition to its Fight Pass service, Zuffa published certain of Plaintiff Quarry's fights on its  
 5 website to promote the UFC. In January 2012, Zuffa published a video of Plaintiff Quarry's fight with  
 6 Demian Maia, deeming it the "Submission of the Week." SAMF ¶ 67. Plaintiff Quarry received no  
 7 compensation from Zuffa in connection with the posting of this video. *Id.*

8 Plaintiff Quarry's win over UFC Fighter Shonnie Carter was also featured in episode Number  
 9 107 of "UFC Unleashed," a program that Zuffa produced for Spike TV. Weiler Decl.Exs. 9- 10; SAMF  
 10 ¶ 6. That video was also posted on Zuffa's website on or about September 13, 2013, where it remains  
 11 today. Weiler Decl.Exs. 9- 10. In September 2013, Zuffa published episode Number 102 of "UFC  
 12 Unleashed," featuring Plaintiff Quarry's win against Lodune Sincaid in The Ultimate Fighter in 2005,  
 13 to its Brazilian language website. SAMF ¶ 68. Plaintiff Quarry received no compensation from Zuffa in  
 14 connection with either of those episodes of "UFC Unleashed." SAMF ¶¶ 68-69.

15 Plaintiff Quarry also featured prominently in a story published by UFC called "16 Bizarre  
 16 Moments in UFC History." SAMF ¶ 71; Weiler Decl.Ex. 11. A photograph of Plaintiff Quarry appears  
 17 in that article, as well as an account of one of Plaintiff Quarry's victories in the Octagon. Weiler  
 18 Decl.Ex. 11. ("Quarry, who chased his foe in frustration for the 15 minute bout, even resorted to  
 19 showboating (including the 'running man') to try to get Starnes to fight, but to no avail, and he was  
 20 forced to settle for a decision victory."). Zuffa published the story on March 26, 2013 and Plaintiff  
 21 Quarry received no compensation for the use of his image. *Id.*; Quarry Decl.¶ 12; SAMF ¶ 71.

22 On June 10, 2016 Zuffa published a photograph of Plaintiff Quarry's fight with Rich Franklin in a  
 23 story on its website entitled "Behind the Lens: UFC Photog's Favorite KOs." SAMF ¶ 72. Plaintiff  
 24 Quarry received no compensation for the use of this photograph. *Id.*

25 **2. Zuffa Used and Continues to Use Plaintiff Quarry's Image and Likeness in  
 26 UFC Licensed Merchandise Within the Limitations Period.**

1 As of March 2017, posters autographed by Plaintiff Quarry promoting his title fight in UFC 56  
 2 remained for sale by Zuffa on the “ufcstore.com” website for \$999.99 and \$1,149.99. SAMF ¶ 75.  
 3 Plaintiff Quarry has received no compensation from any sales of these posters. *Id.*

4 Zuffa licenses images and likenesses of members of the Identity Class to Topps, a company that  
 5 publishes trading cards. SAMF ¶ 73. Plaintiff Quarry was featured in a series of UFC trading cards  
 6 created by Topps, including the “2010 Topps UFC Knockout” series that was published in February  
 7 2011. SAMF ¶ 74. Plaintiff Quarry’s image also appeared in the “2013 Topps UFC Knockout” series as  
 8 part of the “Ultimate Knockout Relics Set.” SAMF ¶ 74. Documents produced in discovery reflect that  
 9 in the Fourth Quarter of 2013, a \$0.08 royalty was attributed to Plaintiff Quarry for 50 “Units Sold” of  
 10 “Trading Cards” as “UFC Direct Sales.” Quarry Decl. Ex. 1. Zuffa has never explained this transaction  
 11 to Plaintiff Quarry, and Plaintiff Quarry never received any compensation for Topps cards in 2013.  
 12 SAMF ¶ 74.

13 Zuffa licenses certain identity rights of members of the Identity Class to Reebok, a company that  
 14 manufacturers sporting apparel. SAMF ¶ 76. Plaintiff Quarry was also featured by Reebok in a series of  
 15 UFC jerseys that first appeared in 2014. *Id.* As Plaintiff Quarry testified, “You can order yourself a  
 16 Reebok jersey with my name on it.” Quarry Dep. Tr. at 104:16-17. Plaintiff Quarry was not compensated  
 17 for any of these products. SAMF ¶ 76.

18 Zuffa also licenses to Getty Images the right to sell photographs of UFC Fighters, including  
 19 Plaintiff Quarry. *Id.* ¶ 77. [REDACTED]

20 [REDACTED]  
 21 Weiler Decl. Ex. 19. There is some evidence that Zuffa sold Getty Images of Plaintiff Quarry in 2013.  
 22 Quarry Decl.Ex. 1. Dozens of photographs of Plaintiff Quarry remain for sale on the Getty Images  
 23 website. Weiler Decl.Ex. 20. For example, Getty Images sells a medium resolution photograph of  
 24 Plaintiff Quarry for \$1,805 to users who wish to use Plaintiff Quarry’s image on the homepage of their  
 25 website for “corporate or promotional use.” SAMF ¶ 78; Weiler Decl.Ex. 21.

26 **3. Zuffa Has Accounted for Uses of Plaintiff Quarry’s Image or Likeness  
 27 Within the Limitations Period.**

1 Documents produced in litigation confirm that Zuffa continued to use Plaintiff Quarry's identity  
 2 within the limitations period, and that Zuffa continues to artificially under-compensate Plaintiff Quarry  
 3 for the use of his image and likeness.

4 A document produced by Zuffa dated December 31, 2013, identifies five instances of Zuffa  
 5 appearing to account for uses of Plaintiff Quarry's image or likeness within the limitations period:

- 6 • A \$0.13 royalty was generated in the First Quarter of 2011 in connection with Plaintiff  
     7 Quarry's image or likeness;
- 8 • A \$0.24 royalty was generated in the Third Quarter of 2012 in connection with Plaintiff  
     9 Quarry's image or likeness;
- 10 • A \$5.00 royalty was generated in the Fourth Quarter of 2012 in connection with Plaintiff  
     11 Quarry's image or likeness;
- 12 • A \$10.00 royalty was generated in the Third Quarter of 2013 in connection with Plaintiff  
     13 Quarry's image or likeness;
- 14 • A \$0.08 royalty was generated in the Third Quarter of 2013 in connection with Plaintiff  
     15 Quarry's image or likeness.

16 Quarry Decl.Ex. 1. Zuffa realized much larger revenues. *Id.* Plaintiff Quarry did not receive the royalty  
 17 amounts reflected on these documents when they were accrued. Quarry Decl.¶ 19-22; SAMF ¶¶ 73-74,  
 18 77. These royalty amounts, which were artificially suppressed due to the scheme Plaintiffs allege,  
 19 demonstrate that the uses of Plaintiff Quarry's identity are both new and accumulating, as Zuffa has  
 20 assigned at least five of them a nominal value. Of course, there are many valuable uses of Plaintiff  
 21 Quarry's identity for which Zuffa has provided *nothing*.

### 22 III. ARGUMENT

#### 23 A. Standard Governing Summary Judgment

24 Zuffa has not met its burden on summary judgment. As the statute of limitations is an  
 25 affirmative defense, Zuffa bears the initial burden of showing that Plaintiff Quarry's claim is time-  
 26 barred. "When a defendant seeks summary judgment on a statute of limitations affirmative defense, the  
 27 initial burden rests on the defendant to demonstrate by sufficient, competent evidence that the defense  
 28 applies to bar the claim. . . . If the defendant meets this burden, the claim is barred by the statute of

1 limitations unless the plaintiff can establish a disputed issue of material fact as to the application of the  
 2 defense or provide sufficient facts to establish a *prima facie* case for tolling the statute of limitation.”  
 3 *Alarcon v. Am. Family Ins. Grp.*, 2010 U.S. Dist. LEXIS 60879, at \*5-6 (D. Colo. June 18, 2010). To carry  
 4 its initial burden, Zuffa must provide evidence that Plaintiff Quarry’s claims are time-barred by  
 5 demonstrating both the harm and the wrongdoing occurred outside of the limitations period. *Cal.*  
 6 *Sansome Co. v. United States Gypsum*, 55 F.3d 1402, 1406 (9th Cir. 1995) (“defendant raising the statute  
 7 of limitations as an affirmative defense has the burden of proving the action is time barred” and “the  
 8 defendant has the burden of demonstrating the complained of wrongdoing and harm occurred outside  
 9 the limitations period”). Only if Zuffa produces this evidence does the burden shift to Plaintiff Quarry  
 10 to provide contrary evidence. *Id.* at 1407-08; *see also Houghton v. South*, 965 F.2d 1532, 1536-37 (9th Cir.  
 11 1992) (to shift the burden, defendant must “establish the absence of a genuine issue of fact on each issue  
 12 material to [the] affirmative defense”).

13 Any evidence presented by Plaintiff Quarry must be viewed in the light most favorable to him,  
 14 and all inferences must be drawn in his favor. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (citing *Adickes*  
 15 *v. Kress*, 398 U.S. 144, 157 (1970)); *Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir.  
 16 2001) (citation omitted).

#### 17       B.     Zuffa Has Failed to Carry its Initial Burden.

18 To shift the burden to Plaintiff Quarry, Zuffa was required to produce evidence that  
 19 demonstrates the statute of limitations has expired. *Cal. Sansome Co.*, 55 F.3d at 1407-08 (defendant  
 20 failed to introduce evidence shifting the burden to plaintiff). Zuffa has failed to do so. Even without  
 21 considering the raft of evidence that Zuffa continued to use Plaintiff Quarry’s identity during the  
 22 limitations period—which indisputably causes Quarry antitrust injury on each exploitation without fair  
 23 compensation—Zuffa’s motion should be denied.

24 Zuffa does not dispute that, during the limitations period, it used and continues to use his image  
 25 or likeness without compensation at competitive levels, *i.e.*, the compensation that Zuffa would have  
 26 paid him and other Identity Class members had it not engaged in its anticompetitive scheme. CAC ¶¶  
 27 22, 34. Plaintiff Quarry specifically alleged that Zuffa used his identity in connection with licensed  
 28 products such as video games and UFC trading cards, and that each such use constituted antitrust

1 injury. *Id.* ¶ 34, 50; *see also Cung Le v. Zuffa, LLC*, 2016 U.S. Dist. LEXIS 145478 at \*44-45 (use of  
 2 Plaintiffs' images and likenesses without fair compensation is an antitrust injury for the Identity Class).  
 3 Given Zuffa's failure to contest those allegations, they must be accepted as true. *City of Long Beach v.*  
 4 *Standard Oil Co.*, 872 F.2d 1401, 1404 (9th Cir. 1989) ("In reviewing the summary judgment motion we  
 5 accept the city's undisputed allegations as true.").

6 Zuffa has also produced *no evidence* that the anticompetitive scheme alleged by Plaintiffs stopped  
 7 in 2010. Zuffa similarly has produced *no evidence* that the use of Plaintiff Quarry's image or likeness  
 8 without fair compensation stopped in 2010. And Zuffa has produced *no evidence* to contradict Plaintiff  
 9 Quarry's allegations that the use of his likeness in connection with UFC Topps trading cards is  
 10 continuing and did not stop in 2010.

11 Instead, Zuffa has presented evidence only that Plaintiff Quarry entered into a contract in  
 12 January 2010, in connection with his last fight in March 2010. Motion at 8-10. Zuffa argues that Plaintiff  
 13 Quarry's claims are barred because the "terms he attacks in his agreements . . . were fixed outside the  
 14 four-year limitations period." *Id.* at 9.

15 But Zuffa's evidence does not address the relevant conduct for purposes of statute of limitations.  
 16 Plaintiff Quarry alleges antitrust injury caused by Zuffa's ongoing *scheme as a whole*—including  
 17 hundreds of contracts with multiple entities (among them sponsors, venues, merchandisers and fighters)  
 18 and other conduct unrelated to contracts. CAC ¶¶ 109-134. Indeed, as the CAC makes clear, Plaintiffs  
 19 do not claim they were injured by their respective individual contracts, but instead by the scheme as a  
 20 whole. *Id.* ¶ 115. Plaintiffs allege that the scheme, rather than their contracts standing alone, gave Zuffa  
 21 the monopsony power to extract class members' identity rights for no or uncompetitive compensation  
 22 levels, and then to continue to exploit those rights and injure class members during the limitations  
 23 period and continuing to this day. *Id.* ("Plaintiffs allege here that all of the UFC's contracts with  
 24 Fighters—and the exclusionary provisions therein—taken together form part of the UFC's anticompetitive  
 25 scheme to impair actual or potential rivals and enhance its" monopsony power). Many elements of this  
 26 scheme, including the acquisition of StrikeForce and the many uses of Plaintiff Quarry's identity  
 27 without compensation, occurred less than four years before Plaintiff Quarry filed suit.

Zuffa's contention that the statute of limitations issue should be controlled by class members' own individual contracts, thus, misunderstands the scheme. Plaintiffs do not allege that they were harmed by any one contract by itself, but rather that the contracts collectively, together with the other aspects of the scheme, afforded Zuffa the monopsony power to extract identity rights from each class member at uncompetitive prices, and then continue to exploit those rights during the limitations period. Zuffa's position violates the cardinal rule that "character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). "Though not a pleading standards case, *Continental Ore* warns against 'tightly compartmentalizing the various factual components' of a plaintiff's case 'and wiping the slate clean after scrutiny of each.'" *In re Lithium Ion Batteries Antitrust Litig.*, 2014 U.S. Dist. LEXIS 7516, at \*71-72 (N.D. Cal. Jan. 21, 2014) (quoting *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1118 (N.D. Cal. 2012)). By seeking to tie the statute of limitations issue to only a single contract out of a scheme that includes thousands of contracts and multiple other facets, Zuffa improperly cabins the claims presented. This Court has already rejected Zuffa's attempt to analyze the scheme by reference to a single element of it when it noted, "The Court disagrees with the contention that a single element of a scheme, if legal, makes legal the conduct as a whole" and Zuffa "overlooks the scheme that Plaintiff alleges, and concerns itself instead with the validity of the exclusive dealing agreements." *Cung Le v. Zuffa, LLC*, 2016 U.S. Dist. LEXIS 145478 at \*42. In its current Motion, Zuffa repeats the same mistake.

#### **C. Plaintiffs, Including Plaintiff Quarry, Allege Continuing Antitrust Violations and Injuries.**

Assuming *arguendo* Zuffa's Motion shifted the burden, Plaintiff Quarry has carried it. Each time that Zuffa used Plaintiff Quarry's image or likeness without fairly compensating him constituted a new invasion of his rights and new antitrust injury. Each occasion thus involved an "overt act" restarting the statute of limitations.

##### **1. Each Overt Act Injuring Plaintiff Quarry Restarted the Statute of Limitations.**

Illegal conduct that continues to invade a plaintiff's rights, and thereby causes antitrust injury, restarts the statute of limitations. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502, n.15 (1968). Additionally, the statute of limitations begins anew each time a defendant takes an "overt act" that injures a plaintiff, such as, *e.g.*, each time a defendant overcharges a buyer in a price fixing case or each time a defendant artificially under-compensates a seller of services, like Quarry here, in a monopsonization case. *See, e.g., Solo v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014) ("the Supreme Court and federal appellate courts have recognized that each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act."); *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1301 (9th Cir. 1986) (holding that a new overt act occurred each time tour operators shepherded tourists away from plaintiffs' shop in exchange for payment); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 290-91 (4th Cir. 2007) ("[I]n cases like this one involving allegations of 'a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, *e.g.*, each sale to the plaintiff, starts the statutory period running again.'" (quoting *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997)); *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999) amended in part, 211 F.3d 1224 (11th Cir. 2000) (holding that each sale of milk a price-fixed price constitutes a new overt act (*citing Klehr*, 521 U.S. at 189)).

An overt act restarts the statute of limitations where it is a "new and independent act that is not merely a reaffirmation of a previous act" and inflicts "new and accumulating injury" on the Plaintiff. *Free FreeHand Corp. v. Adobe Systems, Inc.*, 852 F. Supp. 2d 1171, 1187-88 (N.D. Cal. 2012) (quoting *Pace Indus. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987)).

## 2. Plaintiff Quarry Presents Ample Evidence of Overt Acts Within the Limitations Period.

Zuffa took multiple overt acts after December 16, 2010, sufficient to restart the statute of limitations period as to Plaintiff Quarry, including its launch of Fight Pass in December 2013. *See O'Bannon v. NCAA*, 2010 U.S. Dist. LEXIS 19170, at \*16 (N.D. Cal. Feb. 8, 2010) ("O'Bannon has sufficiently alleged a continuing violation" where the "NCAA continues to enter into agreements that

allow the use of his image without compensation paid to him"). In addition to Fight Pass, Zuffa used Plaintiff Quarry's image and likeness without compensation dozens of times since December 2010. His likeness has been featured in trading cards, posters, and commercial photographs. SAMF ¶¶ 73-75, 77. He has appeared on Zuffa's MMA programming, including episodes of television and internet MMA entertainment created by Zuffa and in the opening credits of Zuffa's PPV events. SAMF ¶¶ 63, 67-72. His image and likeness have also appeared in content posted on Zuffa's website. *Id.*

*O'Bannon* is directly on point. In *O'Bannon*, a former UCLA basketball player, who starred on the Bruins' 1995 NCAA championship team, sued the NCAA in 2009 alleging "its member schools and various businesses conspired to fix the price of former student athletes' images at zero." 2010 U.S. Dist. LEXIS 19170, at \*13. The NCAA moved to dismiss O'Bannon's claims as barred by the statute of limitations, but the court ruled that "in 2007, [the] NCAA entered into an agreement with Thought Equity Motion, Inc. to offer 'classic' college basketball games online," and thus Plaintiffs had alleged the NCAA's sale of videos with O'Bannon's image restarted the statute of limitations. *Id.* at \*16. Counsel for Zuffa submitted a brief on behalf of O'Bannon that identified the correct legal framework to address Plaintiff Quarry's claims:

The NCAA has repeatedly invaded Plaintiff's commercial interest by obtaining revenue from the exploitation or sale of Plaintiff's image. Each sale by Defendants was a new and independent act and caused a new and accumulating financial injury to Plaintiff. *These sales*, which Defendant had to be advertised, promoted or negotiated before the sale took place, *constitute independent overt acts*—they were far from "passive" events. Videos with Plaintiff's image are currently available for purchase through on-line stores.

Weiler Decl.Ex. 22 at 19 (O'Bannon's Opposition to NCAA's Motion to Dismiss at 19 (emphasis added)). The court adopted the arguments made by Zuffa's counsel, and later ruled that O'Bannon and other similarly situated plaintiffs could proceed to trial on the same theory: "This Court previously recognized that the continuing violations doctrine applied to Plaintiffs' claims in this case because Plaintiffs alleged that the NCAA committed certain overt acts after July 2005 which revived Plaintiffs' antitrust claims. . . . Although Plaintiffs have failed to identify any evidence of those overt acts here, they may nevertheless proceed to trial on their claims." *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d at 1139.

The NCAA sought dismissal of similar claims filed by NBA legend Bill Russell, who won the 1955 and 1956 NCAA championship at the University of San Francisco. *Russell v. NCAA*, 2012 U.S. Dist. LEXIS 68684 at \*8-9. Russell, like O'Bannon, alleged that the “NCAA and its co-conspirators have worked together to depress to zero the amount paid to student-athletes for their likenesses in perpetuity.” *Id.* Applying its earlier ruling, the court in *Russell* ruled that plaintiff had plead a continuing violation based on the allegations “that footage from specific games in which he played and at least fifty-four video-clips featuring his collegiate image currently appear on Thought Equity Motion’s website.” *Id.* at \*12.

The results in *O'Bannon* and *Russell* are consistent with the decisions courts have reached in multiple analogous antitrust actions, including Section 2 claims based in part on acquisitions and antitrust injuries that include overcharge payments.

For instance, in *Free FreeHand*, the court ruled that “overt acts” for purposes of restarting the statute of limitations in a Section 2 monopolization cause of action included acts as part of an anticompetitive scheme that followed an acquisition. 852. F. Supp. 2d at 1188 (“Plaintiffs’ claims are not based solely on the fact that Adobe acquired Macromedia”); *see also Smith v. Ebay Corp.*, 2012 U.S. Dist. LEXIS 1211, at \*15-16 (N.D. Cal. Jan. 5, 2012) (“Plaintiffs’ claims of monopolization and attempted monopolization are not based solely on the fact that eBay acquired PayPal.”) (holding claims are timely). Those cases involved the same type of multifaceted scheme that Plaintiffs allege here.

Courts have also found that monopolists who charge supracompetitive prices cannot rely on the statute of limitations for repose. *See, e.g., Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 295 (2d Cir. 1979) (a monopolist that “continues to use the power it has gained illicitly to overcharge its customers . . . has no claim on the repose that a statute of limitations is intended to provide”); *id.* (“[i]t is only when the monopolist, having devoured its smaller rivals, enjoys the spoils of its conquest by boosting its price to excessive levels that a purchaser ‘feels the adverse impact’ of the violation”); *Marchbanks Truck Serv. v. Comdata Network, Inc.*, 2011 U.S. Dist. LEXIS 158011, \*81, 2011 WL 11559549 (E.D. Pa. Mar. 24, 2011) (citing *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 217 (3d Cir. 2008) (“[I]n the context of a continuing conspiracy to violate antitrust laws, a claim accrues

1 each time a plaintiff is injured by an act of the defendant and, as to those damages, the statute of  
 2 limitations runs from the commission of the act.”).<sup>6</sup>

3 The scheme here, as in *O'Bannon* and *Russell*, is the mirror image of supracompetitive pricing  
 4 schemes in cases such as *Berkey Photo Inc.*: Zuffa, a monopsonist, continued to use Plaintiff Quarry’s  
 5 likeness and image without paying fair compensation, selling products and services containing the  
 6 images and likenesses of Plaintiff Quarry and other class members. Each time Zuffa, a monopsonist,  
 7 fails to pay Plaintiff Quarry at a competitive rate its overt act restarts the statute of limitations, just as  
 8 each overcharge by a monopolist does the same.

9 Finally, there can be no doubt that the harm to Plaintiff Quarry from each use of his likeness or  
 10 image without fair compensation is both new and accumulating. Documents produced in discovery  
 11 demonstrate that each admitted new use of Plaintiff Quarry’s likeness or image is separately credited by  
 12 Zuffa, albeit at artificially suppressed levels. *See, e.g.*, Quarry Decl. Ex. 1. That Zuffa appears to have  
 13 separately accounted for at least five uses of Plaintiff Quarry’s image or likeness within the limitations  
 14 period confirms that each use of Plaintiff Quarry’s identity without fair compensation is an “overt act”  
 15 that has independent value.<sup>7</sup>

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 18       <sup>6</sup> *See also Univac Dental Co. v. Dentsply Int'l, Inc.*, 2008 WL 719227, at \*4 (M.D. Pa. March 14, 2008) (“The continuing violation theory authorizes antitrust recovery for a defendant’s time-barred actions if the plaintiff demonstrates that they caused the plaintiff to incur damage within the limitations period.”); *Meijer, Inc. v. 3M*, 2005 WL 1660188, at \*4 (E.D. Pa. July 13, 2005) (in “purchaser antitrust actions” such as this one, “the requisite injurious act within the limitations period can include being overcharged as a result of an unlawful act which took place outside the limitations period”); *In re K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 551 (D.N.J. 2004) (“Plaintiffs have alleged that they were overcharged and paid supra-competitive prices for K-Dur as a result of Defendants’ settlement agreements. As such it appears that Plaintiffs’ claims are not barred by the statute of limitations to the extent that they bought and overpaid for K-Dur within the applicable time limitations.”); *In re Buspirone Patent Antitrust Litig.*, 185 F. Supp. 2d 363, 378 (S.D.N.Y. 2002) (“if a party commits an initial unlawful act that allows it to maintain market control and overcharge purchasers for a period longer than four years, purchasers maintain a right of action for any overcharges paid within the four years prior to their filings.”).

26       <sup>7</sup> Zuffa presents no evidence that [REDACTED] See SUF ¶ 39. As an initial matter, on its face the payment made by Zuffa purports to relate only to the Merchandise Rights Agreement. But Plaintiff Quarry’s identity rights were expropriated by a number of agreements, including the Exclusive Promotional and Ancillary Rights Agreement, that purported to make Plaintiff Quarry’s image and likeness [REDACTED]  
 27 [REDACTED]

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3  
4       **D. Plaintiff Quarry Does Not Simply Seek Benefits from a Distant Harm or Claim**  
**Performance of His Contract as an “Overt Act.”**

5

6       Zuffa argues that Plaintiff Quarry cannot demonstrate a continuing violation because “receipt of  
 7 benefits from [the] pre-limitations period” cannot be the basis of a continuing violation. Motion at 12.  
 8 Again, Zuffa mischaracterizes Plaintiff Quarry’s claims. Plaintiff Quarry’s claims do not arise from the  
 9 mere *receipt of benefits*, but from a continuing scheme and Zuffa’s many uses of Plaintiff Quarry’s  
 10 identity that occurred after December 16, 2010. Accordingly, Zuffa’s reliance on *Aurora Enters. v. Nat’l*  
 11 *Broad. Co.*, 688 F.2d 689, 694 (9th Cir. 1982), Motion at 11, is misplaced. In that action, NBC took *no*  
 12 *overt act* that harmed the plaintiff after the statute of limitations period had expired. Instead, NBC  
 13 continued to passively receive the benefits of “syndication profits” from a contract it had entered into in  
 14 1966. The only overt act alleged by plaintiff in that matter was “coerc[ion]” that occurred in 1966: “In  
 15 1973, defendant NTA purchased the assets of NBC’s syndication subsidiaries and took over syndication  
 16 of NBC’s programs. NBC now receives syndication profits, if there are any, from NTA. Defendant  
 17 NTA is entitled to a share of syndication profits under its contract with NBC. However, the mere fact  
 18 that defendants receive a benefit today as a result of a contract executed in 1966 in which Xanadu was  
 19 purportedly coerced to part with syndication rights, is not enough to restart the statute of limitations.”

20       *Id.*

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22 Additionally, there is no evidence of the existence of an agreement between Plaintiff Quarry and Zuffa  
 23 that any payment from Zuffa was to compensate Plaintiff Quarry for all future uses of his image or  
 24 likeness. The documents referenced as Exhibits H & I to Zuffa’s motion provide no support for the  
 25 existence of any agreement about an advance on royalty payments or the use of Plaintiff Quarry’s image  
 26 of likeness. Other evidence, such that Zuffa separately paid Plaintiff Quarry \$625 for the use of his  
 27 identity in a videogame in October 2010, conflicts with Zuffa’s characterization. *See* Exhibit J to Zuffa’s  
 28 Motion. Plaintiff Quarry does not deny receiving \$2,500 from Zuffa in March 2009, but was unaware of  
 the purpose of the payment at the time. Quarry Decl., ¶ 22. [REDACTED]

27       [REDACTED] Accordingly, Plaintiff Quarry objects to Paragraph 12 of the  
 28 Declaration of Kirk Hendrick because it lacks foundation, assumes facts that have not been established,  
 and it is non-admissible hearsay.

Aurora does not apply where, as here, a defendant has engaged in an ongoing scheme comprised of many anticompetitive acts, including overt instances of active exploitation of Plaintiff Quarry's identity rights in new and different ways during the limitations period. Zuffa was not merely passively receiving the benefits of a contract. Courts applying *Aurora* have recognized its narrow application. For example, the court in *Free Freehand* ruled that Section 2 claims that concerned a pattern of anticompetitive conduct following an acquisition is not “‘continu[ing] indefinitely to receive some benefit as a result of an illegal act performed in the distant past.’” 852 F. Supp. 2d at 1187 (quoting *Aurora*, 688 F.2d at 694).<sup>8</sup>

Similarly, Zuffa's characterization of Plaintiff Quarry's claims as the “unabated inertial consequences of some pre-limitations action,” Motion at 13 (quoting *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68 (9th Cir. 1979)), is inaccurate. The harm that is the basis of Plaintiff Quarry's claims is *not inertial*—it results from *affirmative acts* that Zuffa has taken since 2013, including the creation of Fight Pass, which indisputably resulted in no compensation to Plaintiff Quarry. In *Multidistrict Vehicle Air Pollution*, the Ninth Circuit considered a refusal to deal case where the refusals all occurred more than four years before the plaintiff AMF filed suit: “No forbidden ‘overt acts’ occurred thereafter; appellees merely supplied their needs from sources other than AMF.” *Id.* at 71.

*Pace Indus., Inc. v. Three Phx. Co.*, 813 F.2d 234, 236(9th Cir. 1987), Motion at 12, is likewise inapposite. The plaintiff there challenged one discrete act—initiation of a lawsuit seeking an injunction to restrain plaintiff—and the lawsuit was filed more than four years after the injunction was sought. *Id.* The Ninth Circuit ruled there was no continuing violation because the actions taken since the lawsuit were indistinguishable from the irrevocable first act of filing suit: “The initiation of a lawsuit is the final, immutable act of enforcement of an allegedly illegal contract. At that point in time the lawsuit assumes an existence separate from the contract. All subsequent acts are controlled by the exigencies of

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<sup>8</sup> *Eichman v. Fotomat Corp.*, 880 F.2d 149 (9th Cir. 1989), Motion at 9, is similarly inapposite. In that matter, the defendant had done nothing since entering into a lease agreement except passively receive payments: “The mere fact that Eichman has made lease payments to Fotomat since 1968 does not establish Fotomat's ability.” *Id.* at 160.

litigation, not enforcement of the contract.” *Id.* at 236. In *Pace*, the plaintiff had failed to allege any “new” conduct because all of the purported ongoing conduct was the maintenance of the same lawsuit. *See also MedioStream, Inc. v. Microsoft Corp.*, 869 F. Supp. 2d 1095, 1105 (N.D. Cal. 2012) (conduct was not “new” because the plaintiff sued Microsoft in 2007 for the *exact same conduct* Microsoft had committed starting in 2002). Here, the specific uses of Plaintiff Quarry’s identity are both new and accumulating because Zuffa has initiated many different ways to monetize the identity rights in the last several years, including Fight Pass and the 2014 deal with Reebok.

Finally, Zuffa argues that performance of a contract that was executed outside the statute of limitations period cannot be an “overt act.” Motion at 12. Those authorities are inapplicable because the conduct Plaintiff Quarry challenges is a monopsonization scheme involving the collective effect of thousands of contracts, as well as other facets—which combined afforded Zuffa the monopsony power to exploit the identity rights of class members in new and different ways during the limitations period. Plaintiffs’ claims are not simply challenging the express terms of individual contractual agreements. Zuffa’s citation to *Varner v. Peterson Farms*, 371 F.3d 1011(8th Cir. 2004), Motion at 12, is thus inapposite. The challenged antitrust conduct there was the entry into a tying agreement, and the purported “overt acts” were simply the “express terms” of the challenged agreements. *Id.* at 1019-1020; *see also See Witt Co. v. Riso, Inc.*, 948 F. Supp. 2d 1227, 1236 (D. Or. 2013) (“performance of an alleged illegal contractual tie-in provision does not satisfy the continuing violation requirements”). The uncompensated uses of Plaintiff Quarry’s identity were not spelled out in his contracts with Zuffa. Indeed, many of the schemes Zuffa had used to exploit the identity rights it had expropriated had not been initiated in January 2010, when Plaintiff Quarry signed his last contract with Zuffa.

#### IV. CONCLUSION

Zuffa has not carried its burden to demonstrate that Plaintiff Quarry’s claims are barred by statute of limitations. Zuffa has engaged in ongoing scheme to exploit the images and likeness of UFC Fighters such as Plaintiff Quarry, taking various overt acts and failing to compensate them during the statutory period. Zuffa improperly addresses only the dates on which he signed his contracts. But Zuffa has used Plaintiff Quarry’s identity without compensating him on numerous occasions since he signed his last contract in January 2010, and thus found multiple new and different ways to cause him and the

1 other members of the identity class to suffer antitrust injuries. There is ample evidence that Zuffa  
2 committed “overt acts” within the statutory period.

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